

Facilitating Interest-based Negotiation as a GAL/AMC: *BORROWING FROM THE MEDIATOR'S TOOLKIT*

Professor Carrie Kaas
Quinnipiac University School of Law
Co-Director of Center on Dispute Resolution
November 4, 2011

WHAT KINDS OF CASES?

- ▶ Parents both Self-Represented Parties
 - May be high conflict
 - May just need some help/guidance
- ▶ Represented parties: High Conflict Cases
 - Conflict coming parents
 - Conflict coming from lawyers
 - Both parents & lawyers

USUALLY NOT NEEDED IF REASONABLE PARENTS with
REASONABLE LAWYERS – They get there on their
own – one way or the other

WHY ENCOURAGE AGREEMENT

- ▶ Making it Better for the Kids
 - Reducing conflict in the future – skills & plans
 - Improving communication
 - Avoids destructive demonizing at trial
- ▶ More likely to comply with the terms of a plan
they participated in making
- ▶ Consistent with general themes of respecting
parental autonomy & self-determination

GAL/AMC ROLE

- All Standards (ABA, NCCUSL) agree Child Advocates should play a role in assisting parents to settle
- CONNECTICUT COURTS have strong policy in favor of settlement
 - Reducing time between start and finish – child's sense of time during upheaval of divorce
 - Reduce negativity between parents
 - However -- VERIFY that settlement in this case is best for THESE kids

KNOWING WHEN NOT TO HELP SETTLEMENT: What cases SHOULD be tried?

- Settlement just for settlement's sake: NOT ALWAYS IN CHILD'S BEST INTERESTS!
- One unreasonable parent: the other one should NOT capitulate if the result is bad for the child
- Intimidation/threat by one parent – not truly an agreement
- Both parents agreeing to a plan that is adult-focused and not good for the kids

WHY a PREFERENCE for INTEREST-BASED NEGOTIATION?

- RELATIONSHIP PRESERVATION – key for separating parents
- More likely to be creative solutions
- Enhanced likelihood that the result will really be "better fit" – NOT just a compromise and NOT "You know it is a success if everyone is a little bit unhappy."

WHAT is INTEREST-BASED NEGOTIATION?

- ▶ INTEREST vs. POSITION is the KEY
- ▶ POSITION: What the parent says s/he wants – specific proposal or demand
- ▶ INTEREST: The underlying need, motivation— (may or may not be aware of their own interests)
- ▶ WINDOW IN THE LIBRARY EXAMPLE!

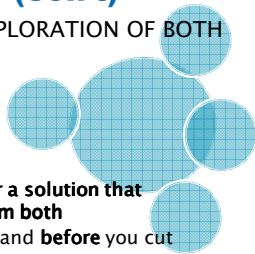
WISE WORDS TO REMEMBER:

You can't always get what you want
 You can't always get what you want
 You can't always get what you want
 But if you try sometimes you might find –
 You get what you need.

(by Jagger, Mick)

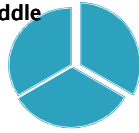
WHAT is INTEREST-BASED NEGOTIATION? (con't)

- ▶ OPEN DISCUSSION & EXPLORATION OF BOTH PARENTS' INTERESTS
- ▶ SYNONYMS:
 - Win/Win
 - Mutual Gain
 - Principled
 - Integrative – **searching for a solution that "integrates" the needs from both**
 - Expanding the Pie -- expand **before** you cut
 - 2 parties "vs." the problem to be solved
 - Less-adversarial /Cooperative



WHAT is POSITIONAL NEGOTIATION?

- ▶ Bartering/ping-pong back and forth between positions (what you say you want) until you see if your "bottom lines" overlap (Zone of possible agreement)
- START HIGH/GO LOW = Meet in middle**
- ▶ SYNONYMS:
 - Win/Lose
 - Dividing the Pie
 - Distributive
 - Competitive (may still be civil & cordial)
 - **More appropriate for strangers, or buying and selling -- not parents!**



CONCEPTS

DISTRIBUTIVE FEATURES: Think of Cutting the Pie
- what things can be divided. **However, avoid making all issues into items to divide - time, days, overnights. TRAP!!!**

Instead, look for **INTEGRATIVE POTENTIAL**: meeting the interests, not satisfying positions by doing trade-offs and calculations

Mom gets Tuesday nights because she coaches child's SOCCER and the practices are on Tuesday, not just because it offsets Dad's Wednesday.

CONCEPTS con't

- ▶ **OPTIONS**: the choices/proposals within the negotiation
- ▶ **ALTERNATIVES**: what you can do/get if you do not settle - BATNA or MLATNA



ASSESSING SETTLEMENT OPTIONS

It is not rational for Parties to settle for an option that leaves them WORSE OFF than they would be if they rejected the proposal, and went with an alternative.

But remember: other factors that go into the calculus of "Better" and "Worse" – **time, money, stamina, and impact on kids**

CONCEPTS (con't)

- ▶ **EMPATHY:** The ability to see/articulate the other side's interests, without necessarily agreeing with them; NOT a synonym for weak
- ▶ **ASSERTIVENESS:** The ability to assert your side's needs even in the face of resistance; NOT a synonym for obnoxious



- **THE BEST NEGOTIATORS ARE ABLE TO DO BOTH- even with the obvious inherent tension**
- **THE BEST FACILITATORS ARE ABLE TO HELP THE PARTIES DO BOTH**

WHAT DO GALs/AMCs DO?

- ▶ Facilitating the Negotiation
 - To encourage settlement rather than trial
 - To improve the quality of the solution – parental focus on interests, not just positions
 - To insert the interests/voice of the child: Actually a party to this negotiation – you will SIGN OFF on it.
- ▶ **We are NOT MEDIATING!!!!**
 - NEVER use this term to describe what you are doing in these meetings
 - Bad for GAL/AMC work; Bad for Mediation profession: DANGEROUS ROLE CONFUSION

ONE DEFINITION OF MEDIATION

- ▶ Consensual, self-determined process in which participants work together with the facilitation of an impartial, trained third-party to address the conflict
- ▶ Provides opportunity to:
 - Clarify issues and interests
 - Express feelings
 - Explore options
 - Be heard
 - Craft a voluntary, mutually agreed-upon outcome

Definition, con't

- ▶ Fundamental Principles Include:
 - Balanced and Respectful Process
 - Self-Determination – 3rd party has NO AUTHORITY
 - Confidentiality
 - Direct Participation by parties
 - Impartiality
 - Safety
- [Connecticut Mediation Network, Sept. 2010]
 May or may not be voluntary to attend.
 Note: Mediators must be impartial but do not necessarily have to be "NEUTRAL" --
 May properly have a stake in getting a settlement and if so, on what terms.

COMPARISON — MEDIATION and CHILD ADVOCACY

DIFFERENCES

MEDIATOR	GAL/AMC
Impartial, not a party	"Party"
No other role/authority	Will testify or argue
Confidential/ inadmissible	Can use what happens
Some neutrality	Not neutral
Usually knows nothing going into the session;	Has investigated;
no independent investigation,	probably has ideas for
no prior ideas on result	acceptable outcomes
(Never met the child!)	Met Child!!!!
	May attend the mediation

COMPARISON — MEDIATION & CHILD ADVOCACY

SIMILARITIES

- ▶ Knowledgeable Third-Party
- ▶ Education is part of the job
 - Impact on kids
 - Will a judge approve the settlement? (Reality-check)
- ▶ Unbiased re: parents
- ▶ Not an advocate for either parent – even if come to agree with one of them
- ▶ Should care about the results – make sure good for the kids – some possible solutions are OUTSIDE the range of acceptable

Are you meeting with Parents TOGETHER at some point?

- ▶ Absent IPV, recommended answer is YES.
- ▶ MOST EFFECTIVE potential for:
 - Ability to use the mediation tools to get them to shift to interests, finding common ground
 - Breakthroughs -- understanding each other
 - Think about your own comfort level with unhappy people in conflict – IMAGINE HOW THE KIDS FEEL!
 - Learn to tolerate being with people in conflict:
 - not shutting strong emotion down too fast; vent
 - model ability to face dilemma non-defensively

Brain Neuroscience to Know:

- ▶ Emotion (Fear & Anger) triggers release of ADRENALINE from AMYGDALA –primitive response
- ▶ Shut down of cognitive abilities –for 20 min or more –esp. males.
- ▶ You cannot TALK/REASON someone out of defensiveness; you can TRIGGER A NEW EMOTION to get them “back”– such as love for child.
- ▶ Be careful of your OWN adrenaline release– impairs your cognition!

MEDIATOR ORIENTATION DEBATE

- ▶ Facilitative “vs.” Evaluative
 - Riskin’s Grid; became polarizing
 - Just manage the process/pure neutral –or– Give opinions?
- ▶ Elicitive – Directive: Continuum
 - Riskin’s Evolving Idea
 - Everyone Facilitates; Sometime “Evaluation” is educational and positive (WWJD)
 - Real issue is the degree of Directiveness:
 - Do you elicit the ideas/solutions from the parties;
 - Do you make suggestions?
 - Do you direct them to select a particular result
- ▶ Transformative: reject solving only the immediate problem-- teach them how to deal with future issues

ROLE OF NORMS IN MEDIATION

- ▶ Waldman focused on nature of dispute and norms, not on mediator behavior
- ▶ The stronger the dominant Norms and Values at stake, the less “purely neutral” the mediator
- ▶ Family Law is NORM EDUCATING and perhaps even NORM ADVOCATING -- the mediator should not stand by and let parents avoid settlement OR just let the parties agree to whatever they want. COURT APPROVAL!

THE TOOLKIT

- ▶ Get out of the courtroom hallways
- ▶ Focus on Interests
- ▶ Enhance Empathy (seeing other side)
- ▶ Do not fear some high emotion – get used to it!
- ▶ Set a Structure as a guide
- ▶ Adopt the Elicitive Continuum
- ▶ Use Reframing
- ▶ Serve warm drinks
- ▶ Ask more open and truly curious questions
- ▶ Decrease defensiveness when educating and making suggestions: feedback statements and predictions

INTERESTS & EMPATHY

- ▶ Spend time getting parties to identify their needs and motivations – they are probably stuck in positions --LIST THEM ON A BOARD/FLIP CHART to be the CRITERIA by which you will assess the proposals
- ▶ Some interests from EACH side -- BALANCE
- ▶ Consider asking each party to articulate what they hear as the OTHER side's interests, needs – What does our solution have to do to be acceptable to the other side?

STRUCTURE

- ▶ Flexible yet with a purpose--Not a random chat, not a rigid formula
- ▶ STORYTELLING – you may have already done this separately, but a benefit to some of this in the room together
- ▶ AGREEMENT ON ISSUES
- ▶ DEFINING INTERESTS
- ▶ BRAINSTORMING OPTIONS
- ▶ ASSESSMENT & NARROWING
- ▶ CHOOSING/BARGAINING

CONTINUUM

- ▶ ELICIT – Brainstorming phase;
 - Push them hard here to generate things other than their own favorite outcome;
 - Break up “package deals”
- ▶ SUGGEST –
 - Try a question format at first “Have you considered....”
 - What would it be like if...?”
 - I see one thing that we do not yet have up on the board...
- ▶ “DIRECT” –
 - Feedback on some options that are not OK for the child
 - If there is one or two clearly better options for the child, you may have to just say it.

REFRAMING

- ▶ Summarizing what you have heard someone say
 - Reassuring that you are listening
 - Testing assumptions and accuracy
- ▶ Not parroting or even paraphrasing
- ▶ Doing it in the presence of the other party
- ▶ CHANGE and DE-ESCALATE the words
 - Retain the essence of what the person said
 - Shift to Interests
 - Make the message more easily "heard" by other parent
 - Extremely helpful in the "Identifying Interests" stage

Warm Drinks and other factors

- ▶ Student of cognitive psych & neuroscience
 - Food and Drink
 - Language
- ▶ Setting the tone for settlement
 - Where- calm, peaceful environment - cookie smell!
 - Balance/symmetry and equal time!
 - Your tone and body language

ENHANCING NON-DEFENSIVENESS

- ▶ Ellison's Theory
 - We use the war model as our infrastructure for communication
 - Change the way we:
 - Ask QUESTIONS
 - Make STATEMENTS
 - Use PREDICTIONS
 - www.pndc.com
 - "Taking the War Out of Our Words"

ENHANCING NON-DEFENSIVENESS

- ▶ Questions
 - Body language and facial expression
 - Tone– down at the end, neutral & musing
 - Intent: Open, curious, sincere– GATHER INFO!
 - Not to give a message – change intent for asking the question; avoid entrapping
 - CONTENT
 - Who, What, When, Where, How, Why
 - “What do you mean by...”
 - Test Assumptions
 - Ask about intention
 - PROCESS – during the meeting
 - Motivation or Intention: “What made you do this at this time?” “Did you mean to prevent us from reaching agreement?”

Example: QUESTION (1)

CONTENT:

Takes you to the Taproot of the Meaning in this conversation:

Dad makes a suggestion for his involvement with the kids’ activities.

Mom erupts “No way! He is just too darn unreliable!”

REACTION? ASSUMPTION?

WHAT DO YOU MEAN BY
UNRELIABLE?

Example: QUESTION (2)

- ▶ PROCESS
- ▶ Almost done with last issue –settlement imminent:
- ▶ Mom says: So....WHEN are we going to talk about your affair?
- ▶ REACTIONS? ASSUMPTIONS?

WHAT MADE YOU BRING UP
THE ISSUE OF THE AFFAIR
AT THIS MOMENT?

FEEDBACK: COMMON PROBLEM

- ▶ DEFENSIVE MODEL/Misuses of Statements:
 - Try to convince others to agree
 - State opinion as fact
- ▶ CONVINCING: Even when trying to empower them, you are probably helping to entrench them in their own resistance.
 - "I can't do that."
 - "Sure you can!"
 - Reaction:

ENHANCING NON-DEFENSIVENESS

- STATEMENTS for FEEDBACK
- 1–3 are neutral and descriptive
- 4 is express reasoning, reaction, emotion
- Same format as GOSSIP--
 - 1. What I hear you say
 - 2. What I know/see that contradicts
 - Body language
 - What they said before
 - Outside Data
 - 3. Then I Conclude...
 - 4. And I react/feel...

FORMAT FOR STATEMENT

- WHEN I HEAR YOU....
- AND AT THE SAME TIME....
- THEN I THINK....
- AND SO I FEEL
- 1. What did the person say with his words?
- 2. What's wrong with this picture?
- 3. What do I think is really going on?
- 4. What is my reaction?

Example: STATEMENT (1)

- I hear you say that you are comfortable and "just fine" with how this meeting is proceeding.
- At the same time, I see you fidgeting, unwilling to make eye contact, and sighing every time I ask a question or raise an issue.
- It seems to me that you either do not want to participate at all or are frustrated with how we are using our time, but are unwilling to tell me what is bothering you.
- I am concerned that we will not be able to reach an outcome that will meet the needs of everyone here unless you tell me what you are thinking.

Example: STATEMENT (2)

- You have both told me that you do not want to go to trial and that the most important thing is your children's happiness.
- And at the same time, one of you has found fault with every possible variation parenting plan that we have come up with here.
- It seems to me that the anger between the two of you is still blocking both of you from being able to do the work of establishing a plan.
- I worry that we will run out of time and that you will have to go to trial over the parenting issues, and that no schedule imposed by the court will be as good for your kids as several of the options you have discussed- and rejected - today.

ENHANCING NON-DEFENSIVENESS

- PREDICTIONS – calm and firm tone
 - Can be to set personal limits – what YOU will do
 - Format for describing the consequences we believe a person will experience from the outside world, without our influence, if she makes a particular choice
 - Not trying to control the choice, coax or persuade – not punitive/coercive
 - HOLDING UP A MIRROR – affecting outcome

Format for a PREDICTION

Format is "IF, THEN"
Addresses both choices
Precise and exact as possible
Calm and neutral tone

- *If you do X, then I believe Y will occur*
- *If you do not do X, then I believe Z will occur.*

Example: PREDICTION (1)

- ▶ I believe that if you don't ask for help from your ex-husband when you run into a scheduling problem at work, you will end up with chaotic and unpredictable child care that will upset the kids, and you will end up looking less concerned for the kids' well-being.
- ▶ I believe that if you do ask for help when you run into an unexpected work problem, your children will end up with much more comfortable arrangements, your ex-husband will be more inclined to work with you when you need something else, and you will end up looking more concerned about the kids' needs than your own.
- ▶ NOT: What, are you dense? Ask for help!

Example: PREDICTION (2)

- ▶ You both agreed that you would listen to what each of you had to say, and take turns speaking. You have not been able to do this for the last 15 minutes.
- ▶ I think we should take a break and everyone should go outside and cool down, for the next 15 minutes.
- ▶ When we resume, if you are not able to let the other person speak without shouting at her, then I will not be willing to continue with this settlement meeting.
- ▶ If you are able to let her speak without shouting, then I would be happy to continue to work with you in this session.
- ▶ **KEY: LET GO OF OUTCOME. TRUE CHOICE.**
- ▶ **NOT A THREAT; MORE OF A PROMISE.**
